LG 70 Doe v Amherst Youth Hockey, Inc.
2021 NY Slip Op 33537(U)
February 17, 2021
Supreme Court, Erie County
Docket Number: Index No. 808193/2020
Judge: Deborah A. Chimes
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Mohan 003

SUPREME COURT: STATE OF NEW YORK
COUNTY OF ERIE

LG 70 DOE

Plaintiff(s),

vs.

DECISION
INDEX NO.: 808193/2020

AMHERST YOUTH HOCKEY, INC.,
USA HOCKEY INC.,
NEW YORK STATE AMATEUR HOCKEY ASSOCIATION, INC.

Defendant(s).

Defendants, USA Hockey, Inc. and New York State Amateur Hockey Association, Inc., (hereinafter collectively, USA Hockey), moved to consolidate this action with the action filed under index number 808195/2020 and to amend the caption (NYSCEF motion 002). Defendant, Amherst Youth Hockey, Inc., joined the motion. There was no opposition to the motion.

USA Hockey also moved to dismiss the Complaint pursuant to CPLR 3211(a)(7) (NYSCEF motion 003). Plaintiff opposed the motion to dismiss and cross-moved for leave to Amend the Complaint (NYSCEF motion 004). Defendants, USA Hockey and Amherst Youth Hockey, Inc., opposed the motion for leave to Amend.

This claim was brought pursuant to the Child Victims Act (CPLR 214-g). In the Complaint, plaintiff alleges that he/she was a participant in the Amherst Youth Hockey program and that he/she was sexually abused by team coach, Larry Walter, from 1977 through 1981.

Pursuant to CPLR 602(a), USA Hockey moved to consolidate this action with *LG 70 Doe v Larry Walter*, index number 808195/2020, and to amend the caption to include Larry Walter.

The motion is granted pursuant to CPLR 602(a) as the two matters involve common questions of law and/or fact. Moreover, the motion was unopposed.

USA Hockey also moved to dismiss the Complaint pursuant to CPLR 3211(a)(7). "On a motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7), we accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. At the same time, however, allegations consisting of bare legal conclusions . . . are not entitled to any such consideration. Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery" (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141-142 [2017] [internal citations omitted]).

"Where evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211 (a)(7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate" (*Christ the Rock World Restoration Church Intl., Inc. v Evangelical Christian Credit Union*, 153 AD3d 1226, 1229 [2d Dept 2017] [citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 274-275 [1977]]). "[A]ffidavits submitted by the defendant will seldom if ever warrant the relief he seeks unless too the affidavits establish conclusively that plaintiff has no cause of action" (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]).

As to the claims for vicarious liability, here there is no employer-employee relationship, as the alleged perpetrator of the abuse was a volunteer coach. Nonetheless, "[u]nder the doctrine of respondeat superior, a principal is liable for the negligent acts committed by its agent within the scope of the agency…[A] principal-agent relationship can include a volunteer when the requisite conditions, including control and acting on another's behalf, are shown" (*Rozmus v Wesleyan Church of Hamburg*, 161 A.D.3d 1538, 1539 [4th Dept 2018] internal citations omitted). Assuming, for purposes of this motion, that a principal-agent relationship existed between USA Hockey and Walter, the same general standards that apply to an employer-employee relationship under a theory of respondeat superior would likewise apply.

"Under the doctrine of respondeat superior, an employer may be vicariously liable for the tortious acts of its employees only if those acts were committed in furtherance of the employer's business and within the scope of employment" (*Doe v Rohan*, 17 AD3d 509, 512 [2d Dept 2005], *lv denied* 6 NY3d 701 [2005]). Sexual abuse is a clear departure from scope of employment, "committed solely for personal reasons, and unrelated to the furtherance of his employer's business" (*id.*; *see also*, *Torrey v. Portville Cent. Sch.*, 2020 NY Slip Op 50244(U) [Sup Ct Cattaraugus County 2020]; *Mazzarella v Syracuse Diocese*, 100 AD3d 1384, 1385 [4th Dept 2012]; and *Mary KK v Jack LL*, 203 AD2d 840, 841 [3d Dept 1994]). Therefore, as a matter of law, the doctrine of respondeat superior is not applicable to the present matter. The motion to dismiss of USA Hockey is granted and all causes of action based on a theory of vicarious liability for the alleged abuse of plaintiff by Walter are dismissed. Those include the First, Fifth and Sixth causes of action in the Complaint.

The remainder of plaintiff's claims; the second, third and fourth causes of action, are based on negligence. The Court finds that the Complaint states a claim for negligence against USA Hockey. Moreover, the Affidavits submitted by USA Hockey do not conclusively establish that no significant dispute exists regarding the allegations of negligence. Without more and at this stage of the litigation, the allegations must be accepted as true and plaintiff should be allowed an opportunity to engage in discovery. Whether there is factual support for plaintiff's allegations and the existence of a duty running from the moving defendants to plaintiff may be addressed after further discovery in a motion for summary judgment. The motion to dismiss the negligence causes of action is denied.

Plaintiff cross-moved to amend the Complaint to add additional allegations and causes of action all of which are based on negligence. CPLR 3025(a) states that "[a] party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it." Under the circumstances here, CPLR 3025(a) must be read in conjunction with CPLR 3211(f), which states that "[s]ervice of a notice of motion under subdivision (a) or (b) before service of a pleading responsive to the cause of action or defense sought to be dismissed extends the time to serve the pleading until ten days after service of notice of entry of the order."

Here, the initial Complaint was filed on July 31, 2020. USA Hockey did not Answer the Complaint, but instead filed a motion to dismiss on September 29, 2020. Plaintiff's time to Amend the Answer pursuant to CPLR 3025(a) is extended, per CPLR 3211(f), to ten days after service of notice of entry on the motion to dismiss. Plaintiff's motion is therefor denied as unnecessary.

Counsel for USA Hockey is to prepare and submit Orders on NYSCEF motions 002 and 003. Plaintiff is to prepare and submit an Order on NYSCEF motion 004. All Orders shall attach the Court's Decision and are to be filed within 30 days.

DATED: Buffalo, New York
February 17, 2021

HON. DEBORAH A. CHIMES, J.S.C.